89-1723

Supreme Court, U.S.
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No.

In the Supreme Court of the United States

October Term, 1989

JOHN J. B. JONES,
an Individual,
Petitioner,

vs.

BASKIN FLAHERTY ELLIOTT & MANNINO, P.C.,
a Professional Corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

May, 1990

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BEST

QUESTIONS PRESENTED

I. Where a charge of age discrimination was initially filed at the E.E.O.C. on the 280th day and referred by the E.E.O.C. to the state antidiscrimination agency pursuant to the Worksharing Agreement, does complainant's subsequent election to have the E.E.O.C. investigate his charge deny him the benefit of the extended 300-day filing limit under Section 626(d) of the Age Discrimination in Employment Act of 1967?

II. Under principles of agency law, are the dual-filing provisions of the Worksharing Agreement "self-executing", so that a charge filed with the E.E.O.C., an authorized agent of the state deferral agency, is deemed filed with the state agency, despite a later decision by the complainant to not refer the charge to the state agency for investigation?

III. Where a complainant has been advised by the E.E.O.C. of a right to have his charge investigated by either the State or the E.E.O.C., but has not been advised that choosing the E.E.O.C. bars his federal age discrimination claim as untimely, is the complainant entitled to the doctrine of equitable tolling?

VAILABLE COPY

PARTIES & RULE 28.1 LIST

The parties to the proceedings in the court below were:

John J. B. Jones, an individual, the appellant and petitioner herein;

Baskin Flaherty Elliott & Mannino, P.C., a professional corporation, an appellee and the sole respondent herein;

Philip Baskin, an individual and appellee below;

Raymond N. Baum, an individual and appellee below;

James B. Brown, an individual and appellee below;

Victor R. Delle Donne, an individual and appellee below;

Robert E. Fiorito, an individual and appellee below;

James J. Flaherty, an individual and appellee below;

Linda L. Goldston, an individual and appellee below;

Kenneth E. Lewis, an individual and appellee below;

R. Darryl Ponton, an individual and appellee below;

Charles E. Wittlin, an individual and appellee below;

Nelson P. Young, an individual and appellee below; and

Swartz Albanesi Izenson & Company, a partnership and an appellee below.

Because this petition relates exclusively to the age discrimination claims contained in Count I of the Complaint, then the sole respondent herein is the petitioner's former employer, to-wit: Baskin Flaherty Elliott & Mannino, P.C.

Said respondent, Baskin Flaherty Elliott & Mannino, P.C., has no parent companies, subsidiaries or affiliates to list pursuant to Rule 28.1.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Petitioner, John J. B. Jones, respectfully prays that a writ of certiorari issue to review the Judgment Order of the United States Court of Appeals for the Third Circuit, entered in this proceeding on January 9, 1990.

OPINIONS BELOW

The Memorandum Opinion and Order of the United States District Court for the Western District of Pennsylvania, dated April 11, 1989, are not reported and are set forth as Appendix A at pages 1a to 14a.

The Judgment Order of the Court of Appeals dated January 9, 1990, is not reported and is set forth as Appendix B at pages 15a to 16a. The Order of the Court of Appeals, dated February 7, 1990, which denied the Plaintiff's Petition for Rehearing before the Panel is not reported and is set forth as Appendix C at pages 17a to 18a.

JURISDICTION

The Judgment Order of the Court of Appeals was entered on January 9, 1990.

The Order of the Court of Appeals denying the Plaintiff's Petition for Rehearing before the Panel was entered on February 7, 1990.

Jurisdiction of this Court is proper under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

28 U.S.C. Section 1254(1)

Age Discrimination in Employment Act of 1967, as amended (ADEA), 29 U.S.C. Section 621, *et seq.*

29 U.S.C. Section 626(d)—(text at 2a, 3a)

29 U.S.C. Section 633(b)—(text at 3a)

REGULATIONS INVOLVED

29 C.F.R. Section 1626.9

29 C.F.R. 1626.10(c)

STATEMENT OF THE CASE

Petitioner, John J. B. Jones ("Jones"), was employed as an attorney by the Respondent law firm, Baskin Flaherty Elliott & Mannino, P.C. ("BFEM"), from September 16, 1975, to March 31, 1985.

On December 4, 1984, when he was sixty (60) years old, Jones was orally informed that he would be terminated on March 31, 1985.

On September 10, 1985, (280 days from December 4, 1984), Jones filed with the Equal Employment Opportunity Commission ("EEOC") a written and sworn charge of age discrimination by BFEM under the Age Discrimination in Employment Act ("ADEA").

Jones resides in Pennsylvania, a "deferral state", which has a Section 706 agency, the Pennsylvania Human Relations Commission ("PHRC"), with jurisdiction over and remedies for age discrimination cases. Under the worksharing agreement between the EEOC and the PHRC, each agency is the authorized agent of the other agency for the purposes of receiving charges of discrimination. For informational purposes, in order to notify the PHRC of the charges so received by the EEOC, the agreement further provides that, at the end of every week, copies of all ADEA charges received by the EEOC during that week are mailed to the PHRC. (Record at 167a). Jones' charge was thus dual-filed at both the EEOC and the PHRC on the date of its docketing at the EEOC.

Jones was advised by the EEOC representative that he had the option of having the investigation of his charge conducted by either the EEOC or the PHRC and he elected to have it done by the EEOC. (Record at 252a). The EEOC did commence the investigation of his charge.

Because his two year time limit for commencing an ADEA action in federal court was nearly over, on December 1, 1986, Jones filed a multicount federal Complaint alleging age discrimination. (Record at 52a).

BFEM filed a motion for summary judgment on the ADEA claim alleging that Jones was not entitled to the extended 300 day filing period in a deferral state for failure to satisfy the necessary procedural filing requirements, because Jones had elected to have the EEOC, not the PHRC, investigate his case. BFEM argued that thus Jones' ADEA charge was time barred, because he was not entitled to the 300-day extended time for filing.

In response to BFEM's motion for summary judgment on Count I of the Complaint, Jones submitted to the District Court: (i) the text of the worksharing agreement between the EEOC and the PHRC, and (ii) an affidavit from the Director of the EEOC's Pittsburgh Area Office, affirming that the worksharing agreement, which is self executing, provides that the EEOC dual file all charges both at the EEOC and the local state agency. It further provides that the EEOC will investigate charges (such as Jones') which are initially instituted at the EEOC by complainants, including those filings made between the 180th and 300th days. (Record at 172a). Jones concurred that the EEOC should do so in his case.

The EEOC affidavit confirms that the EEOC duly initiated proceedings with the PHRC on Jones' behalf and sent them notice of the filing of his charge. (Record at 167a).[1]

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[1]In his affidavit, said Director confirmed that: (1) throughout the relevant period, it was the regular and routine practice of the EEOC's Pittsburgh Area Office to refer to the PHRC all ADEA charges received

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On April 11, 1989, the District Court ruled that Jones' ADEA charge was not timely and that Jones was not entitled to the 300 day extended filing period. The lower court concluded that the EEOC's receipt of the charges on the 280th day, and Jones' election under the worksharing agreement to have the EEOC investigate his charge, resulted in a failure of the EEOC to "institute proceedings" with the state agency. This ruling contravenes the EEOC's own interpretations of its actions under the worksharing agreement as explicitly set forth in the EEOC's affidavit. The court granted BFEM's motion for summary judgment on the ADEA claim.

Jones timely appealed the judgment of the District Court to the Third Circuit Court of Appeals. Jones sought and received leave of the Court of Appeals to submit into the record a second Affidavit from the Director of the EEOC's Pittsburgh Area Office. In this Affidavit, said Director confirmed that: (i) under the Worksharing Agreement in effect between the EEOC and the PHRC when Jones filed his charges, the filing of an ADEA charge with the EEOC was considered received by the PHRC on the same day and that proceedings were thereby initiated with the PHRC on that same date; (ii) even if a claimant specifically instructed the EEOC not to refer an ADEA charge to the PHRC, whether for investigation or otherwise, nevertheless, a written referral was made by the EEOC to the PHRC in accordance with the federal regulations governing the EEOC found at 29 C.F.R. 1626.9 and the EEOC Compliance Manual; and (iii) the ADEA charge filed by Jones with the EEOC on September 10, 1985, would have

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(Continued)

by the EEOC in order to comply with Section 14(b) of the Act and to preserve the individuals' rights, and (ii) at the end of every week, all ADEA charges received during the week were mailed to the PHRC.

been automatically referred by mail to the PHRC within the week, (i.e. no later than day 287).

The Third Circuit Court of Appeals affirmed the judgment of the District Court on January 9, 1990, without an opinion. Jones timely filed with the Court of Appeals a Petition for Rehearing before the Panel, and the EEOC timely filed a Brief with the Court of Appeals as Amicus Curiae in Support of the Petition for Rehearing.

The Court of Appeals denied the Petition for Rehearing on February 7, 1990, without an opinion.

No oral arguments were allowed before either the District Court or the Court of Appeals.

REASONS FOR GRANTING THE WRIT

I. This case involves a question of exceptional public importance, as it concerns the interpretation of standard EEOC worksharing agreements in effect with 81 state or local agencies for age discrimination claims.

Under 81 worksharing agreements between the EEOC and state or local antidiscrimination agencies,[2] each agency is the authorized agent of the other for the purposes of receiving charges of discrimination. The practical effect of upholding the opinion below is to disavow the EEOC's rights under these worksharing agreements to process complaints of discrimination by sharing the work load between the EEOC and the state or local agencies as they see fit. This case presents a question of immense public importance: If the EEOC's referral of an age charge to a state or local agency does not constitute an adequate "initiation of

[2]See EEOC v. Commercial Office Products, 108 S.Ct. 1666 at 1669 (1988).

proceedings", then thousands of federal discrimination complaints will be ruled untimely.

Certiorari should be granted only in cases involving principles, the settlement of which is of importance to the public as distinguished from the parties, and in cases where there is a real conflict of opinion and authority between Courts of Appeals. *National Labor Relations Board v. Pittsburgh S.S. Co.*, 71 S.Ct. 453; 340 U.S. 498 (1951).

Rule 17, Rules of this Court, relating to "Considerations Governing Review on Certiorari" provides that certiorari "will be granted only when there are special and important reasons therefor". In *Rice v. Sioux City Memorial Park Cemetary*, 75 S.Ct. 614; 349 U.S. 70 (1955), this Court said on page 616 (S.Ct.) as follows:

> "Special and important reasons imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance become evasion."

In its Rule 22 Statement set forth at the beginning of the EEOC's Amicus Brief in Support of Jones' Petition for Rehearing before the Court of Appeals, the EEOC stated that "This appeal involves a question of exceptional importance, to wit, the sufficiency of filing an ADEA charge with the EEOC as satisfying the statutory prerequisite of resort to state administrative proceedings before bringing suit in federal court."

In the Statement of Interest in said Amicus Brief, the EEOC stated that "The Equal Employment Opportunity

Commission (EEOC) is the agency established by Congress to interpret, administer and enforce the Age Discrimination in Employment Act of 1967, *as amended,* 29 U.S.C. Section 621 *et seq.* (ADEA) and other fair employment statutes. This case raises an important procedural question regarding the interpretation of worksharing agreements between the EEOC and state fair employment practice agencies and the effect of those agreements and practices on the state administrative proceedings required before filing a judicial action under the ADEA." The EEOC sought to present its views to the lower Court, as Amicus, because this is a question of fundamental importance to large numbers of ADEA claimants and directly affects the EEOC's enforcement activities. The need for uniform national procedural standards for the guidance of the EEOC and all claimants can not be overemphasized.

The opinion of the lower court imperils as untimely thousands of age discrimination complainants who commence their discrimination charges by filing with the EEOC after the 180th day but within 300 days of the discriminatory event, in deferral states. The importance of this issue both to litigants and to the EEOC is demonstrated by the EEOC Appellate Division's status as Amicus Curiae in the Circuit proceedings hereinbelow. This ruling theoretically applies to every age discrimination charge wherein a complainant, who initially files at the EEOC after the 180th day, then elects not to have the state antidiscrimination agency investigate his case. Such litigants have traditionally claimed the benefit of the extended 300 day filing limit under the ADEA for residents of states having remedies against discrimination.

The practical effect of upholding the decision hereinbelow is that the mere election by a complainant to have

his ADEA charge not referred for investigation to the state agency operates to invalidate the deferral provisions in the worksharing agreement between the EEOC and the state agency, thus rendering all such complaints untimely. With respect to the EEOC, the practical effect of upholding the opinion below is to repudiate the EEOC's important existing rights under the worksharing agreements to divide the work load on discrimination charges between the EEOC and the state agency as they both see fit.

The opinion below squarely conflicts with the decision of this Court in *EEOC v. Commercial Office Products*, 108 S.Ct. 1666 (1988), which held that the EEOC's mere referral of charges to a state agency, pursuant to the EEOC's worksharing agreement, does constitute the timely "commencement of state proceedings" for the purposes of ensuring availability of the extended 300-day filing period. In addition, the opinion below conflicts with the principle that the EEOC's interpretation of its own worksharing agreement is entitled to great deference.

The lower court erred in granting summary judgment for the respondent in that it ignored authority holding that an ADEA charge timely filed with the EEOC is presumed to have been filed with the state agency in a deferral state in accordance with the EEOC's regulations and the worksharing agreement. Although the lower court made reference in its opinion to the worksharing agreement, it is readily apparent that the court disregarded or ignored the EEOC's own interpretation of its regulations and the self-executing provisions of the worksharing agreement. Furthermore, since the lower court's opinion made no reference whatsoever to the EEOC's affidavit regarding its regular and routine practice in referring all charges received by

the EEOC to the Pennsylvania Human Relations Commission ("PHRC") within the week, it is also apparent that the court failed to give due deference to the EEOC's unequivocal and uncontroverted statements explaining and interpreting its own activities.

An ADEA complainant in a deferral state is entitled to the extended 300 day time limit under 29 U.S.C. Section 626(d)(2) for filing an administrative charge. *McKelvy v. Metal Container,* 854 F.2d 448 (11th Cir. 1988); *Anderson v. Illinois Tool Works, Inc.,* 753 F.2d 622 (7th Cir. 1985). Assuming that the act of discrimination occurred on December 4, 1984, when Jones was told he was being terminated on March 31, 1985, then Jones' ADEA charge was timely filed with the EEOC on September 10, 1985, on the 280th day after the decision to terminate him.

The ADEA requires that complainants resort to appropriate state administrative proceedings before bringing suit in federal court, 29 U.S.C. Section 633(b); *Oscar Mayer & Co. v. Evans,* 441 U.S. 750 (1979). This requirement has been found to be satisfied by filing a charge within 300 days with the EEOC in a deferral state.

Even without the express regulatory provisions of 29 C.F.R. Sections 1626.9 and 1626.10(c), the terms of the worksharing agreement between the EEOC and the PHRC explicitly provide that filing a charge with either agency constitutes a filing with both, because each designates the other as its agent for the purpose of receiving charges. (Worksharing Agreement Section II. a). (Record at 170a). The agreement also expressly provides that "[a]ge charges initially received by EEOC will be "referred" to PHRC to preserve the charging party's federal court rights". (Worksharing Agreement Section II. j). (Record at 171a).

There is uncontroverted evidence that the EEOC's practice of referring age charges to the PHRC was in effect in September of 1985. In a sworn affidavit, the Director of the EEOC's Pittsburgh Area Office stated that "when an ADEA charge is filed with the EEOC, then the EEOC, under the federal statute, regulations and Worksharing Agreement, must refer the case to the PHRC at the same time even if the claimant requests otherwise." More specifically, he stated that the ADEA charge filed by Jones with the EEOC on September 10, 1985, would have been automatically received by the PHRC on the same date and also would have been automatically referred by mail to the PHRC within the week.[3]

Recently, the Ninth Circuit reviewed the timeliness of a charge filed on the 289th day with the California Department of Fair Employment and Housing ("DFEH"). Although the DFEH did not transmit a copy of the charge to the EEOC until the 301st day, the Ninth Circuit held the charge was timely since the worksharing agreement was self-executing and the DFEH was the duly authorized agent of the EEOC. *Green v. Los Angeles Cty. Superintendent of Schools,* 883 F.2d 1472 (9th Cir. 1989). See, also, *EEOC v. Hacienda Hotel,* 881 F.2d 1504 (9th Cir. 1989).

Even if there were no effective or constructive filing of the state charge, *Oscar Mayer* teaches that a proper disposition of such a case is to hold the federal court proceedings in abeyance to give the plaintiff an opportunity to file a complaint with the state agency. 441 U.S. at 764-65.

Because Jones had already filed a charge with the PHRC on June 16, 1986, (Exhibit B to the Complaint),

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[3] This affidavit was added to the record by leave of the Court of Appeals).

which was dismissed by the PHRC as untimely under Pennsylvania law, he has satisfied the dictate of *Oscar Mayer* and it is clear that dismissal of his ADEA claim as time barred was manifestly inappropriate. 441 U.S. at 765 n.13.

The EEOC's interpretation of its own worksharing agreement is entitled to great deference under *EEOC v. Commercial Office Products,* 108 S.Ct. 1666, 1673; 486 U.S. 107 (1988). That deference was not paid by the lower court in this case.

II. The decision below conflicts with principles established by this Court in EEOC v. Commercial Office Products.

Respondent's case presents a critically important and recurring question in discrimination cases: whether a Plaintiff who has not personally filed a timely discrimination charge with a state agency is nevertheless entitled to claim the benefit of the 300-day extended filing because of the EEOC's referral of his charge to the state agency under the worksharing agreement. To hold that he is not so entitled will imperil as untimely all charges filed at the EEOC between the 180th and 300th days. The most dramatic result of the lower court's holding in this case is the preclusion of any federal relief for an entire class of age discrimination complainants who relied on the EEOC to "institute state proceedings" on their behalf.

This Court has exhaustively addressed the issue of the deference to be paid an EEOC worksharing agreement for a Title VII claimant in *EEOC v. Commercial Office Products,* 108 S.Ct. 1666, 486 U.S. 107 (1988), holding that a Title VII claim initially filed at the EEOC on the 290th day was nevertheless entitled to the benefit of the extended 300

day filing period for charges filed under Section 706(c) initially instituted with a state or local agency, where the state or local agency terminated its proceedings before the 300th day.

In order to be entitled to the longer 300-day filing period, the complainant in *Commercial Office Products* needs to: (i) "initially institute a charge at the state agency", [This was done by the EEOC's referral to the state agency of the charge that the complainant had filed at the EEOC under the worksharing agreement. She did not personally have to go to the state agency; the EEOC did so for her.]; and (ii) if the complainant does not file within 240 days, the charge may still be timely filed with the EEOC if the state or local agency terminates its proceedings before the 300th day. [This was accomplished by the state's waiver of its right to process this particular charge under the worksharing agreement.]

This Court ruled that the state's waiver under the worksharing agreement was "termination" of the charges, so that the EEOC was entitled to process the charge and that the 300-day time limit was applicable.

This Court specifically rejected the argument that the complainant's failure to personally "institute timely proceedings" with the state barred her entitlement to the 300-day extended filing period. In so doing, this Court enunciated the following principles:

(a) A requirement for timely filing at the state to protect federal rights should not be imported into Title VII in light of the remedial purposes of the act, and the fact that lay persons will be confused by state law filing requirements; and

(b) The EEOC's interpretation of Title VII and of its worksharing agreement with the state antidiscrimination agency is entitled to great deference.

This Court further noted that it is of substantial importance to recognize the validity of the worksharing agreements between the EEOC and 81 of the 109 authorized state and local antidiscrimination agencies. These worksharing agreements have the objective of efficiently processing all complaints of discrimination while reserving to the agencies the rights to develop such procedures as will protect complainants' rights while effectively sharing the tremendous workload in so doing. The legislative history of Title VII is replete with examples of the specific Congressional authorization to the EEOC to enter into agreements with local agencies to defer and share the work, which benefits both agencies. [108 S.Ct. at 1669].

These same considerations of time economy, and the expeditious handling of cases support the EEOC's worksharing agreement of record in the instant case. However, the lower court here ruled that since Complainant had not himself personally referred his case to the state agency, he was not thus entitled to the 300-day filing time. Here, complainant filed initially at the EEOC on the 280th day. Upon inquiry, he told the EEOC to investigate his case, and chose not to refer the charge to the state for investigation.

Here, the EEOC itself filed an affidavit below attesting that Petitioner's charge had been duly referred to and filed

with the state in accordance with the provisions of the worksharing agreement.[4]

In the case below, when the Petitioner elected to have the EEOC investigate his charge, he had no intentions of directing the EEOC not to refer his charge to the PHRC for informational purposes and there is no credible evidence in the record to the contrary. Certainly, by the EEOC's own affidavit, the EEOC would disregard any such directive and would automatically refer the charge to the PHRC to protect the complainant's rights to sue in federal court. In this case, the lower court paid no deference at all to the EEOC's affidavit and interpretation of its own worksharing agreement. In so doing, the lower court chose to impose upon the plaintiff a duty not imposed on him by federal law in order to protect his right to file a federal suit. The lower court requires that a Pennsylvania plaintiff personally file with, and have the state investigate, his charge of age discrimination to protect his federal rights. This ruling is not within the letter or spirit of *EEOC v. Commercial Office Products.*

Lay persons (even lawyers) can not be expected to know what the EEOC itself did not know in this case. Here, the EEOC, the federal agency officially charged with processing charges of discrimination and with protecting the rights of victims of discrimination, asked the Plaintiff which agency the Plaintiff preferred to have investigate his

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[4] The worksharing agreement specifically provides:

II a. "In order to facilitate the assertion of employment rights, the EEOC and the PHRC each designate the other as its agent for the purpose of receiving charges."

d. "The delegation of authority to receive charges contained in paragraph II(a) does not include the right of one agency to determine the jurisdiction of the other agency over a charge."

charge. The EEOC certainly did not advise Plaintiff that if he answered "the EEOC", that this choice would forever bar a subsequent federal suit as untimely filed, for failure to meet the entitlement provisions for the extended 300-day time limits. Yet, the EEOC's routine question to the Plaintiff becomes the vehicle by which Plaintiff is forever barred from federal relief for his age discrimination case, unless this Court reverses the lower court's ruling.

III. The decision below conflicts with opinions of other Circuits.

The decision hereinbelow conflicts squarely with opinions of other Circuit Courts of Appeal. The Second, Seventh, Ninth and Eleventh Circuits have all held that an ADEA complainant is entitled to the benefit of the longer 300-day filing time, despite his not having filed such charges with a state agency in time to have met the state's own time limits. Those Circuits have recognized that the EEOC's referral of charges filed at the EEOC to the state agency constitutes a "filing" entitling the complainant to the benefit of the longer 300-day time period, regardless of whether the complainant actually had his file investigated by the state.

In *McKelvy v. Metal Container Corp.*, 854 F.2d 448 (11th Cir. 1988), an ADEA complainant instituted charges at the EEOC and the EEOC referred the charges to the Florida deferral agency on the 254th day. The court held that the EEOC's referral under its worksharing agreement properly instituted proceedings so as to allow the complainant the benefit of the longer 300-day filing limit. In *Anderson v. Illinois Tool Works, Inc.*, 753 F.2d 622, 626 (7th Cir. 1985), the Circuit Court held that under the ADEA, the timeliness of filing with the state agency is "irrelevant", and a charge need not be filed with the state

agency within 180 days. *Accord, see also, Goodman v. Heublein, Inc.*, 645 F.2d 127 (2d Cir. 1981); *Economu v. Borg-Warner Co.*, 829 F.2d 311 (2d Cir. 1987); and *EEOC v. Shamrock Optical Co.*, 788 F.2d 491 (8th Cir. 1986).

Prior to this Court's decision in *EEOC v. Commercial Office Products*, the Fourth Circuit has held that if a complainant does not meet a state's own time limits for filing a discrimination charge with the state agency, s/he is not entitled to the extended 300-day filing limit under the ADEA. See *EEOC v. Ocean City Police Dept.*, 820 F.2d 1378 (4th Cir. 1987); and *Dixon v. Westinghouse*, 787 F.2d 943 (4th Cir. 1986), vacated and remanded in light of *EEOC v. Commercial Office Products*, 108 S.Ct. 1666 (1988).

Only this Court can effectively resolve this troublesome issue of whether its directive in *EEOC v. Commercial Office Products* applies to age discrimination cases, not just to Title VII. Certainly, the procedural requirements imposed on age discrimination complainants should not depend upon the Circuit in which they reside.

The granting of a writ of certiorari to the Third Circuit, remanding in light of *EEOC v. Commercial Office Products*, will send a clear message to the Circuits. Also, granting this writ will immeasurably lighten the burden on District and Circuit Courts who are being confronted daily with resolving the same issue as to what constitutes the timely filing of ADEA charges in deferral states.

IV. The doctrine of equitable tolling should apply where a complainant relies to his detriment on the EEOC's expertise.

In this case, the EEOC, being the federal agency charged with protecting the rights of discrimination victims, advised the Petitioner of his right to choose either the

EEOC or the state investigate his case. In any event, the worksharing agreement assigned the duty of investigating his age charge to the EEOC because the charge was initially received there. Thus, Petitioner merely elected to have the EEOC retain the right to investigate his charge.

Plaintiff was never advised by the EEOC that his innocent choice of the EEOC would deny him entitlement to the extended 300-day time limit for filing in a deferral state and would bar his claim as being untimely. Plaintiff completely placed his trust in the EEOC and the worksharing agreement. Nevertheless, the district court held that Petitioner's mere choice of the EEOC was wrong and that his federal complaint was untimely.

A long line of cases has held that the EEOC's errors do not bar an innocent victim's rights to federal relief. *See Bonham v. Dresser Industries*, 569 F.2d 187 (3d Cir. 1978); *Dartt v. Shell Oil Co.*, 539 F.2d 1256, 1261 (10th Cir. 1976), *aff'd.* 434 U.S. 99 (1977). *Dartt* stands for the proposition that the statute of limitations should be equitably tolled if the EEOC's actions induced detrimental reliance by a victim of discrimination.

Had Petitioner known or been advised that the effect of his choice of the EEOC to investigate would totally destroy his entitlement to the 300-day limit, he obviously would have chosen to have the state conduct the investigation. Unless reversed by this Court, the choice offered to Plaintiff under the worksharing agreement now forever bars Petitioner's right to federal redress for his age discrimination charges. Thus, the simple question asked by the very federal agency charged with protecting the rights of victims of discrimination has destroyed this victim's federal claim.

CONCLUSION

For the reasons set forth herein, the within Petition for a Writ of Certiorari should be granted, vacating the order of the Third Circuit and remanding for reconsideration in light of *E.E.O.C. v. Commercial Office Products Co.*

Respectfully submitted,

CAROLINE MITCHELL, ESQ.
Counsel for Petitioner,
John J. B. Jones

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Dated: May 7, 1990

APPENDIX A—MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JOHN J. B. JONES,
an individual,

Plaintiff,

v.

BASKIN, FLAHERTY, ELLIOT and MANNINO, P.C.; PHILIP BASKIN, an individual; RAYMOND N. BAUM, an individual; JAMES B. BROWN, an individual; VICTOR R. DELLE DONNE, an individual; ROBERT E. FIORITO, an individual; JAMES J. FLAHERTY; an individual; LINDA L. GOLDSTON, an individual; KENNETH E. LEWIS, an individual; R. DARRYL PONTON, an individual; and CHARLES E. WITTLIN, an individual,

Defendants.

Civil Action No. 86-2533

MEMORANDUM OPINION

This pro se action by the plaintiff, John J. B. Jones, alleges that his dismissal as an attorney from the law firm of Baskin Flaherty Elliot and Mannino, P.C. (BFEM) on March 31, 1985 violated the Age Discrimination in Employment Act (ADEA) and the Employee Retirement Income Security Act of 1974 (ERISA). The defendants have filed a motion for summary judgment with respect to the ADEA count, the ADEA conspiracy count, and the ERISA count. The defendants' motion is presently before this court.

LEGAL ANALYSIS

This court has already summarized the facts of this case in its opinion issued in September, 1987, and we will not repeat that summary here. We will begin our analysis by considering the defendants' claim that Jones' ADEA claim is time barred.

ADEA Count

In Count I, Jones asserts a cause of action under the ADEA. The defendants claim that Jones failed to satisfy the procedural prerequisite of the ADEA that the plaintiff file administrative charges within the proscribed time limits.

Section 626(d) of Title 29 sets the time limits for filing an ADEA action in federal court:

> No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such charge shall be filed—

(1) within 180 days after the alleged unlawful practice occurred; or,

(2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

29 U.S.C. Section 626(d). Section 633(b) provides that:

> In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under State law, unless such proceedings have been earlier terminated.

29 U.S.C. Section 633(b).

Thus, the U.S.C. establishes two different limitation periods depending upon whether the state has anti-discriminatory laws that apply to the claimant. In the absence of a state law addressing discrimination, the plaintiff has 180 days to file his charge with the EEOC. 29 U.S.C. Section 626(d)(1). If the state does have anti-discriminatory laws, then the plaintiff has an obligation to pursue his remedies under that law, and obtains additional time to file his charges. 29 U.S.C. Section 626(d)(2); *Oscar Meyer & Co. v. Evans*, 441 U.S. 750, 753 (1979). In such a state, the plaintiff must file both the EEOC charge and the state charge within 300 days in order to preserve his federal

cause of action, regardless of any state statute of limitations. *Equal Employment Opportunity Comm'n v. Commercial Office Products Co.*, 486 U.S. ___, 100 L.Ed.2d 96 (1988). *Oscar Meyer & Co. v. Evans*, 441 U.S. 750, 753 (1979).

Pennsylvania has an authority whose function includes "prohibiting discrimination in employment because of age," namely the Pennsylvania Human Relations Commission (PHRC). Thus, Section 633 applies to this case, and Jones must have filed an action before both the PHRC and the EEOC within 300 days of the alleged discriminatory acts in order to bring this action in federal court. *Kocian v. Getty Refining & Marketing Co.*, 707 F.2d 748, 751 (3d Cir.), *cert. denied*, 464 U.S. 852 (1983). *Oscar Meyer & Co. v. Evans*, 441 U.S. 750, 753 (1979).

Jones argues that his Complaint was timely for several reasons. First, he argues that the December 4, 1984 notice to him of his discharge was procedurally defective. He asserts that the executive committee that made the decision to discharge him was not authorized by the corporate minutes, and thus was "merely ad hoc and had no official corporate status." Therefore, he argues, its acts did not constitute official notice. Similarly, he argues that the Shareholder and Employment Agreement requires sixty days written notice and ratification by eighty percent of the board of directors before termination. Jones asserts that he did not receive written notice and that that board never voted on his termination, and implies that these procedural defects render the notice ineffective.

This court finds Jones's arguments about the technical deficiencies of his notice unavailing. On December 4, 1984, Jones received unequivocal notice that his employment was to terminate on March 31, 1985. The fact that he

subsequently discovered procedural defects in that notice does not accord him the right to claim that he was not aware that he was being discriminated against. Jones did not cite any cases supporting the proposition that such technical defects in the notice would toll the statute of limitations, and this court did not discover any authority for that proposition in its research. Therefore, we find that the statutory periods began to run on December 4, 1984.

Second, Jones argues that his complaint was timely even if the court uses December 4 as the date of notice. The essence of Jones's argument is that the EEOC and the PHRC were parties to a worksharing agreement under which each organization designated the other as an authorized agent for the purposes of receiving charges. Furthermore, under the contract, the EEOC agreed to refer all age complaints to the PHRC on a weekly basis.

Jones filed his charges with the EEOC 280 days after the December 4 notice. Therefore, he argues, the court should presume that the EEOC forwarded the charges to the PHRC within one week. The charges would thus have been before the PHRC by the 287th day, and his complaint is timely. Even if the EEOC did not forward the charges, Jones argues, he should not be penalized by the EEOC's failure to follow its regulations.

We agree that, under some circumstances, it would be unjust to preclude Jones's claim based on the omission of the EEOC. For example, in *Seredinski v. Clifton Precision Products Co.*, 776 F.2d 56 (3d Cir. 1985), the plaintiff filed a charge with the EEOC 280 days after the alleged discrimination. It was unclear from the record whether the EEOC referred the charges to the PHRC, but the court assumed that it had because, "[w]e have previously made it clear that the failure of EEOC to follow its regulations and refer

charges to an appropriate state agency for filing will not deprive complainants of their right to proceed before the EEOC." *Id.* at 61, n.7. *See also Gabrielle v. Barrett, Haentjens & Co.*, 663 F. Supp. 1187, 1191-92 (M.D. Pa. 1986) (protecting the plaintiff from the EEOC's inaction because he was pro se).

The mere fact that Jones filed with the EEOC within the 300 day limitation, however, is not sufficient to preserve his right to sue in federal court. In *Jackson v. Savon Corp.*, 43 F.E.P. Cases 1575 (D.N.J. 1987), the plaintiff filed a charge with the EEOC 297 days after the alleged discriminatory act. The EEOC forwarded a letter to the PHRC on day 309. The court expressed uncertainty about whether the letter constituted an actual filing with the PHRC, but held that even if it were a filing, it was untimely. *Id.* at 1577. The court held that Congress's intent to limit federal jurisdiction over discrimination claims would be undermined if the courts did not adhere to the 300 day limitation strictly. *Id.* The court did not address the EEOC's responsibility or lack thereof for referring the charges to the PHRC.

Several courts have addressed the effects of allegedly misleading or false information provided by an EEOC representative. *In Schier v. Temple University*, 576 F. Supp. 1569 (E.D. Pa.), *aff'd and remanded*, 742 F.2d 94 (3d Cir. 1984), *cert. denied.* 85 L.Ed.2d 300 (1985), the court considered an argument by the plaintiff that she filed her charge with the EEOC late because they had told her on the phone that she had 300 days when, in fact, she did not. The court refused to apply the equitable tolling doctrines because, as a former employee of an employment office, she had "more than average knowledge about the operating of anti-discrimination laws." *Id.* at 1572. Furthermore,

she had retained counsel before she filed her EEOC charge. *Id. See also Hamel v. Prudential Ins. Co.*, 640 F. Supp. 103, 105 (D. Mass. 1986) (equitable tolling not available where EEOC failed to process intake questionnaire in a timely fashion because the plaintiff was represented by counsel); *Keyse v. California Texas Oil Corp.*, 590 F. Supp. 45 (2d Cir. 1978) (allegations of misinformation from an EEOC employee and from the plaintiff's attorney do not excuse failure to file timely charges with the EEOC when plaintiff was represented by counsel).

Conversely, in *Giles v. Carlin*, 641 F. Supp. 629 (E.D. Mich. 1986), the plaintiff alleged that an EEOC counselor advised him to wait until his pending grievance was decided before filing charges with the EEOC. The court held that reliance by an unrepresented layperson on the advice of an EEOC counselor was a reasonable excuse for failing to file within the limitation period. *Id.* at 641. *See also Dartt v. Shell Oil Co.*, 539 F.2d 1256 (10th Cir. 1976), *aff'd*, 434 U.S. 99 (1977).

The facts of this case present an interesting blend of equitable considerations. In many of the cases that we examined, the court relied on the fact that the plaintiff was a pro se litigant in finding that he was entitled to protection from the EEOC's inaction or misinformation. In this case, Jones was not represented by an attorney when he filed his charges, but he is himself an attorney. Furthermore, he explicitly instructed the EEOC representative not to refer the charges to the PHRC. One could argue that this case is not one of omission by the EEOC, but rather a case of the EEOC obeying the explicit instructions of an attorney.

On the other hand, this is not the straightforward scenario presented in *Jackson* either. The plaintiff in *Jackson* filed his complaint so near the 300 day limitation that

normal operating procedures may not have resulted in the charges reaching the PHRC in a timely manner. Jones filed his charge at the EEOC on day 280. The agreement provides that the EEOC will forward all charges to the PHRC within one week. Therefore, under normal circumstances, the PHRC would have received the charges by day 288 at the latest. One could argue that Jones's instructions to the EEOC representative not to forward the charges to the PHRC were directly elicited by the representative's question to Jones as to whether he would prefer that the EEOC or the PHRC investigate his claim. If Jones was misled by the EEOC representative, it may be inequitable to preclude his claim.

After reviewing the facts in this case, this court finds that Jones did not satisfy the prerequisites for bringing an age discrimination action in federal court. The EEOC seems never to have referred his charge to the PHRC, and presentation of his charge to the PHRC is unquestionably a precondition to suit in this court. Were Jones not an attorney who explicitly told the EEOC representative not to refer his charge to the PHRC, we would probably presume that the EEOC had followed its agreement with the PHRC and referred the charge, and we would not penalize him if the EEOC failed to do so. However, his status as an attorney places him on a par with plaintiffs who are represented by counsel, and the case law clearly places a high duty of vigilance on such plaintiffs. Therefore, we find that Jones's ADEA claim is not timely, and we will dismiss Count I.

ADEA Conspiracy Count

In Count II, Jones alleges that various individual members of the law firm conspired to violate the ADEA.

The defendants have moved for summary judgment on Count II, arguing that conspiracy to violate the ADEA is not a viable claim and that the officers or employees of a corporation cannot be liable for conspiracy for a corporate act, except under limited circumstances not present in this case.

The leading Supreme Court case in this area of the law is *Great American S. & L. Ass'n v. Novotny*, 442 U.S. 366 (1979). In *Novotny*, the Court considered the viability of a cause of action for a conspiracy to violate Title VII of the Civil Rights Act, 42 U.S.C. Section 2000(e). The Court found that such an action does not exist. Title VII has many damages limitations and procedural requirements. If a plaintiff could assert a Title VII violation through a conspiracy claim under 42 U.S.C. Section 1985(c), then he "could avoid most, if not all of these detailed and specific provisions of the law." *Id.* at 375-76. The Court concluded that [u]nimpaired effectiveness can be given to the plan put together by Congress in Title VII only by holding that deprivation of a right created by Title VII cannot be the basis for a cause of action under Section 1985(c)." *Id.* at 378.

Although the Court did not refer to the ADEA in *Novotny*, the logic in that case applies equally well to the ADEA. The Court has held that language from the ADEA "was patterned after and is virtually in haec verba with" language from Title VII. *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 755 (1979). Furthermore, lower courts addressing the issue have extended the *Novotny* rule to the ADEA. In *Golden v. Shapell Industries*, 24 FEP Cases 1283 (N.D. Cal. 1980), the court wrote:

> The ADEA and Title VII each set forth procedures for vindication of the statutory rights. The procedural

> provisions of the two acts are similar, and both mandate administrative conciliation efforts. It would be incongruous to hold that an ADEA claim can be pursued under Section 1985(3), when such a claim is barred for rights protected by Title VII. The policies and intent behind the statutes are related, and the limitation imposed by Novotny must apply in each instance.

Id. at 1285. *See also Moorehouse v. Boeing Co.*, 501 F. Supp. 390, 394 (E.D. Pa. 1980), *aff'd*, 639 F.2d 774 (3d Cir. 1981); *Davis v. Southeastern Community College*, 424 F. Supp. 1341 (1976), *vacated in part on other grounds*, 574 F.2d 1158 (1978); *Pavlo v. Stiefel Laboratories, Inc.*, 22 FEP Cases 489, 496-97 (S.D.N.Y. 1979) (allowing the conspiracy count only because the plaintiff was only 35 years old, and, thus, not within the protected class under the ADEA).

We conclude, therefore, that the facts of this case do not present a claim for conspiracy to violate the ADEA, and we will grant the defendants' motion for summary judgment on Count II. We will not consider the defendants' alternative basis for summary judgment, their assertion that the facts of this case do not constitute a conspiracy among corporate officers, except to note that it also seems to be a valid defense to Count II.

ERISA Count

In Count V, Jones asserts a cause of action under ERISA. Essentially, he alleges that the law firm and Philip Baskin breached their fiduciary duty by investing in Israel Bonds and by mismanaging the fund so as to obtain a poor return on the investments. The defendants argue that Jones has failed to support his claim with any specific factual allegations.

The defendants primarily rely on *American Communications Ass'n v. Retirement Plan for Employees of RCA Corp.*, 488 F. Supp. 479 (S.D.N.Y.), *aff'd mem.*, 646 F.2d 559 (2d Cir. 1980). In that case, the plaintiff alleged that the assets were "imprudently invested so as to provide a lower return or yield than could have been obtained by the exercise of prudence." *Id.* at 482. The court found that the plaintiff had failed to support his claim with any specific allegations of imprudence, and had relied on general conclusory allegations. *Id.* at 483. The court wrote that:

> The standard to be applied is that of conduct, tested at the time of the investment decision, rather than performance, judged from the vantage point of hindsight. The complaint contains no factual specification of any act the trustees took or failed to take that resulted in the lower rate of return alleged by plaintiffs. Plaintiffs have not alleged a single act of commission or omission to indicate that the trustees were derelict in the discharge of their fiduciary duties or in what respect it is charged that the trustees failed to discharge those duties "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims."

Id. (footnotes omitted). *See also Metzner v. D. H. Blair & Co., Inc.*, 663 F. Supp. 716, 720 (S.D.N.Y. 1987); *Katsaros v. Cody*, 744 F.2d 270, 279 (2d Cir.), *cert. denied*, 469 U.S. 1072 (1984).

We find a similar lack of specific factual allegations of misconduct by Jones. His only allegations were that he is not Jewish so he would prefer investments other than Israel bonds and that he would have obtained a higher rate

of return in a savings account. Clearly, his personal feelings about investments in Israel bonds do not render the fiduciary's actions unreasonable. Similarly, retrospectively developing an investment strategy that would have yielded a higher rate of return does not prove that the fiduciary's strategy was unreasonable at the time he was acting. Jones's statement in his deposition that he was not prepared to identify specific improper investments because he intended to develop them at trial cannot save his insufficient pleadings. Therefore, we find that Jones has not supported his claim of breach of the fiduciary duty, and we will grant summary judgment on Count V.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JOHN J. B. JONES,
an individual,

Plaintiff,

v.

BASKIN, FLAHERTY, ELLIOT and MANNINO, P.C.; PHILIP BASKIN, an individual; RAYMOND N. BAUM, an individual; JAMES B. BROWN, an individual; VICTOR R. DELLE DONNE, an individual; ROBERT E. FIORITO, an individual; JAMES J. FLAHERTY; an individual; LINDA L. GOLDSTON, an individual; KENNETH E. LEWIS, an individual; R. DARRYL PONTON, an individual; and CHARLES E. WITTLIN, an individual,

Defendants.

Civil Action No. 86-2533

ORDER

AND NOW, this *11th* day of April, 1989. for the reasons set forth in the accompanying Memorandum Opinion,

IT IS HEREBY ORDERED that the Defendants' Motion for Summary Judgment is GRANTED and judgment is entered in favor of the Defendants and against the Plaintiff on Count I, Count II, and Count V of the Complaint.

/s/ GLEN E. MENCER
United States District Judge

cm: All parties of record. *RVB*

APPENDIX B—JUDGMENT ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

United States Court of Appeals

FOR THE THIRD CIRCUIT

Nos. 89-3345 & 89-3439

JOHN J. B. JONES
an individual

v.

BASKIN, FLAHERTY, ELLIOTT,
AND MANNINO, P.C.
PHILIP BASKIN, An individual
RAYMOND N. BAUM, an Individual
JAMES B. BROWN, and Individual
VICTOR R. DELLE DONNE, An individual
ROBERT E. FIORITO, an Individual
JAMES B. FLAHERTY, An Individual
LINDA L. GOLDSTON, An Individual
KENNETH E. LEWIS, an Individual
R. DARRYL PONTON, An Individual
CHARLES E. WITTLIN, an Individual
NELSON P. YOUNG, An individual
and SWARTZ ALBANESI IZENSON &
COMPANY, a Partnership

JOHN J. B. JONES,
Appellant

Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil Action No. 86-2533)
District Judge: Hon. Glenn E. Mencer

Submitted Pursuant to Rule 12(6)
November 21, 1989

Before: HIGGINBOTHAM, MANSMANN and COWEN, *Circuit Judges*

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby AFFIRMED.

Costs taxed against appellant.

BY THE COURT,

/s/ A. LEON HIGGINBOTTOM
Circuit Judge

Attest:

/s/ SALLY MRVOS
Sally Mrvos, *Clerk*

JAN 9 1990

APPENDIX C—ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

United States Court of Appeals

FOR THE THIRD CIRCUIT

Nos. 89-3345 & 89-3439

JOHN J. B. JONES
an individual

v.

BASKIN, FLAHERTY, ELLIOTT,
AND MANNINO, P.C.
PHILIP BASKIN, An individual
RAYMOND N. BAUM, an Individual
JAMES B. BROWN, and Individual
VICTOR R. DELLE DONNE, An individual
ROBERT E. FIORITO, an Individual
JAMES B. FLAHERTY, An Individual
LINDA L. GOLDSTON, An Individual
KENNETH E. LEWIS, an Individual
R. DARRYL PONTON, An Individual
CHARLES E. WITTLIN, an Individual
NELSON P. YOUNG, An individual
and SWARTZ ALBANESI IZENSON &
COMPANY, a Partnership

JOHN J. B. JONES,
Appellant

(D.C. Civil Action No. 86-2533)

SUR PETITION FOR PANEL REHEARING

Present: HIGGINBOTHAM, *Chief Judge,*
and MANSMANN, COWEN, *Circuit Judges.*

The petition for rehearing filed by John J. B. Jones, appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court, and no judge who concurred in the decision having asked for rehearing, and none of the members of the panel having voted for rehearing, the petition for rehearing is denied.

BY THE COURT,

/s/ A. LEON HIGGINBOTTOM
Circuit Judge

Dated: FEB 7 1990